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## THE STATUTES OF EDWARD I—THEIR RELATION TO FINANCE AND ADMINISTRATION.

**P**ERHAPS the most far-reaching effect of the American Civil war, in the long run, could be illustrated by a chart showing government expenditures before and after that rebirth of the nation. The jump from the bottom of the chart to the top, with no apparent tendency to return, reflects a new conception of the function of the government, the creation of new powers and a redistribution of the old ones. In like manner one of the most significant features of the present period of reconstruction throughout the civilized world seems likely to find its graphic representation in a curve that will show not a decrease, but a vast increase in the functions of government. The money needs alone, one can readily see without giving himself up to any dogmatic economic interpretation of history, will have a necessary bearing on the relation between the government and the individual and on the course of legal development—not only because the individual must be reckoned with as the tax-payer, not only because old sources of revenue must be drained and new sources tapped, but for more subtle reasons that can be suggested best by a reconsideration of a period in legal political history that most closely resembles our own in many respects, the period when feudal revenues ceased to satisfy, and the present order of taxation, politics and law was born.

Lord Coke, in his Second Institute, playing on the word “establishments” used in the Introduction to the Statute of Westminster the First, declares:

“Justly may not only these chapters challenge that name, but all other the statutes made in the raigne of this king may be stiled by the name of establishments, because they are more constant, standing and durable laws, then have been made ever since; so as king Edward I, who (as Sir William Herle, chiefe justice of the court of common pleas, that lived in his time, said, *fuit le plus sage roy que unques fuit*) may well be called our Justinian.”<sup>1</sup>

And so Edward I has passed into history as the English Justinian. Blackstone speaks as a matter of course of the “pitch of perfec-

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<sup>1</sup> 2 INST., p. 156.

tion, which [English law] suddenly attained under the auspices of our English Justinian, King Edward the First."<sup>2</sup> In our own day two of the leading historians of our law have devoted whole volumes to the period of Edward the First, one of which bears the subtitle "The English Justinian."<sup>3</sup>

If we merely set the three Statutes of Westminster, the Statute of Gloucester, that of Acton Burnel, that of Winchester, the reissue of Magna Carta, and even the abridgments of Bratton that appeared in his day, alongside of the compilations that bear Justinian's name, the epithet may seem a bit ludicrous. Hengham and Thornton and the writer of the book called "*Britton*" and even the younger Accursius, who may or may not have been in attendance on Parliament in 1276, were apparently not Tribonians. On the other hand, if we consider the attitude of the King, and his counsellors, the general conditions of English law at the time, and the effect of Edward's period on the course of English legal history, there is some basis for the title. Pre-Edwardian law seems an archaic system. Edward's law is easily recognized as the basis of a modern system.

True, no "code," in the modern sense of an all-comprehensive statute, and none in the older sense of an official text of digest, institutes, and scattered statutes, was produced. One may, if he likes, draw conclusions with reference to English empiricism and common sense, or if he prefers he may attribute the codelessness of England at the turning point in its legal history to the English predilection for patchwork and blundering along. Be that as it may, there is reason to believe that Edward and his legal advisers contemplated the making of a code. In the first place, Edward's brother-in-law, Alphonso X, surnamed the Wise, of Castile, had successfully compiled Spanish law in *Las Siete Partidas*. During his youth Edward had spent some time in the court of Alphonso. It is known, too, that his Spanish wife exercised a great influence over him. In fact, some significance, perhaps too much, has been attached to the coincidence that the period of the so-called early statutes, including all those of lasting importance, ends with the death of the Queen

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<sup>2</sup> 1 Com. 23.

<sup>3</sup> Edward Jenks, *EDWARD PLANTAGENET, THE ENGLISH JUSTINIAN, OR THE MAKING OF THE COMMON LAW*, 1901; T. F. Tout, *EDWARD THE FIRST*, 1893. Though the monumental work of Pollock and Maitland bears the title *HISTORY OF ENGLISH LAW TO THE TIME OF EDWARD I*, it of course deals in a large measure with the changes made in the time of Edward.

(1292).<sup>4</sup> It is at least true that a marked change in Edward's disposition dates from this time. But whether or not the King thought seriously of imitating Alphonso, many of his lawyers were certainly moved with the idea of reducing the whole law of England to writing, witness the host of books that appear almost simultaneously, Britton, and the Fleta, the Fet Assaver, Hengham, Gilbert of Thornton's book (described by Selden and apparently rediscovered by Professor Woodbine), and shall we mention *The Mirror*?<sup>5</sup> Apparently the idea of setting out the whole law,—in several instances it was set down in the form of a series of commands in the name of the King (Fet Assaver and Britton) and in one instance at the command of the King (Thornton)—was not the desideratum lacking to make Edward a true Justinian.

That the King and his advisers did not lack the necessary will power to put into the form of a statute what they wished the law of England to be, is sufficiently evidenced by the statutes which have come down to us. In reading these, it is important to bear in mind the historical setting in which they were produced. In the first place, the early statutes—the three statutes of Westminster, that of Winchester, that of Gloucester, and that of Acton Burnel passed before 1292—were not the works of a parliament. The model Parliament was not assembled until 1295. These statutes were more of the nature of ordinances drawn up by advisers of the King and given his formal stamp of approval in the presence of representatives of the clergy and of the tenants in chief of the Crown.<sup>6</sup> Fur-

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<sup>4</sup>This is also the date of the death of his great Chancellor, Robert Burnel, and the possibility must not be overlooked that he was responsible for a large part of the Edwardian legislation. See *infra* on the authorship of the statutes.

<sup>5</sup>The dates assigned by the latest editors to these books agree in placing them well within Edward's reign. The Fet Assaver, not the mere fragment that has accidentally clung to our copies of the FLETA, but the treatise presented in Woodbine's FOUR THIRTEENTH CENTURY LAW TRACTS, belongs to the 1280's, and probably deserves the title heretofore given to the BRITTON of being the first great law book in Norman French. The book called BRITTON is supposed to belong to the year 1291 or 1292. The FLETA is attributed to 1290. Hengham's SUMMAE (MAGNA AND PARVA) belong about to the same period. Horne's MIRROR OF JUSTICES is set down for 1285-1290. Gilbert of Thornton was Chief Justice from 1289-1295. (See I WOODBINE'S BRACON, p. 16, and 25 LAW QUARTERLY REVIEW, 44). Besides, several other abridgements and adaptations of BRATON belong to this period.

<sup>6</sup>Thus the Statute of Westminster was drawn up "by his council and

thermore, the immediate motive behind these conferences with the barons was generally different from that which had prompted either the earlier kings to deal with their barons in the making of law, or the later kings to truckle with parliament. King John, for example, was bullied by his barons because they had found no other way of dealing with him. Henry VIII, and some of the later kings, would gladly have done without parliament but for their personal needs, financial and otherwise. In Edward's day it was necessary to deal with the barons for the purpose of reorganizing the kingdom, which had fallen into a state of decay in the later years of Henry III. If we may judge by the problems to which Edward addressed himself when he ascended the throne upon his return from his crusade in Palestine, the difficulties into which England had fallen may roughly be summarized as the results of ineffective central administration. The inevitable result was that the barons, whose relation with the King were governed on paper by Magna Carta, assumed to themselves whatever power the King's officers had neglected to exercise.<sup>7</sup>

The desire to do away with all anomalies in the relations between the King and his barons furnishes the explanation of some of the first acts of Edward. In the beginning of his reign, he addressed

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by the assent of archbishops, bishops, abbots, priors, earls, barons and all the commonalty of the realm being thither assembled,"

<sup>7</sup> Cf. the introduction to *Placita de Quo Warranto*, edited by William Illingworth for the Record Commission, London, 1818, p. xv: "King Edward I on his return from the Holy Land in the second year of his reign discovered that during the reign of his father, King Henry III, the revenues of the Crown had been considerably diminished by tenants in capite alienating without license, and by ecclesiastics as well as laymen withholding from the Crown under various pretexts its just rights, and usurping the right to hold courts and other *jura regalia*; and that numerous exactions and oppressions of the people had been committed by the nobility and gentry claiming rights of free chase, free warren, and fishery, and demanding unreasonable tolls in fairs and markets. \* \* \* One of his first acts of administration after his arrival was not (as untruly asserted by Lord Coke, 2 INSTR. 280, and 495) to fill his coffers with money, by unjustly dispossessing many of their rights, but to correct the abuses above named." On October 11th of the second year of his reign, he appointed special commissioners with articles of inquiry to investigate the usurpation of *regalia*. The title, *Placita de Quo Warranto et Ragemannis*, has reference not only to the withholding of money from the Crown but also to the oppressions of officers (*Ruegesachen*, cf. GUETERBOCK, SKIZZEN, 24). The complaints against officers are supposed to have been based on a statute of the fourth year of Edward I.

himself to the problem of alienation by his tenants in chief and imposed upon them fines and required licenses for alienation.<sup>8</sup> In the third year of his reign, he begins to raise the question, though not *eo nomine* of *Quo Warranto*<sup>9</sup>—by what right the barons exercise any power that deviates in the slightest from a normal type of feudalism that the King seems to have in mind. The theory with which he begins is that certain rights are *regalia* and can be exercised by the barons only upon showing actual grants from the King or his predecessor in title. In his desire to have all rights and duties set down in black and white, he begins about this time his “extents” of the manors,<sup>10</sup> that is to say, his investigations similar to the Domesday inquests of King William I, for the purpose of cataloguing all the property and interests of the King. There is, however, this difference between the effort of William in inscribing every pig and cow in England, and that of his equally thrifty descendant: William was satisfied with cataloguing and enforcing his rights as he found them; Edward was determined not only to catalogue but to normalize and reduce to a standard the claims of the crown in all parts of England. In the sixth year of his reign, a statute of *Quo Warranto* provided drastic steps for the recaption of all usurped *regalia*.<sup>11</sup>

There is a curious story told by the author of the *Fleta* of a supposed meeting or conclave of all the princes of Christendom in the fourth year of Edward's reign at Montpelier, in which it was declared that no king had the power of permanently alienating *regalia* or essentially royal rights.<sup>12</sup> Selden in his *Dissertatio* has shown pretty conclusively that the meeting never took place.<sup>13</sup> We should be sorry to put the serious-minded author of the *Fleta* in the same

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<sup>8</sup> 1 ED. I, STAT. 2, CH. 12: License and fines for alienation by Tenants in Capite.

<sup>9</sup> 3 ED. I, STAT. OF WESTMINSTER I, CH. 19, deals with the King's debts, *i. e.*, “duties of things due, as rents, fines, issues, amerciements and other duties due to the king.” 2 INST. 198. Local claims of customs are resisted in Ch. 23, 31, 35; Ch. 50 expressly saves to the king “*les droits que a luy apperteign.*” The Quo Warranto statute of 6 E. I. recites that a day had been set in the recent Parliament at Westminster to examine charters of liberties and the like held by subjects to prevent usurpations.

<sup>10</sup> 4 ED. I, STAT. 1: *Extenta Manerii*.

<sup>11</sup> 6 ED. I, STAT. DE QUO WARRANTO. This has come down to us prefixed to the STATUTE OF GLOUCESTER.

<sup>12</sup> SELDEN, DISSERTATIO, CH. 10, SEC. 4.

<sup>13</sup> Selden, after minute examination, concludes: *Atque imponi sibi passus*

class as the author of *The Mirror*, that inveterate inventor of precedents, but certainly the acceptance of the story by a man who did not hesitate to preach a sermon full of hell-fire to the King in the first pages of his book,<sup>14</sup> argues that it was generally believed in Edward's day that Edward was right and such swashbucklers as the Earl of Warrene wrong on the subject of *Quo Warranto*.<sup>15</sup> Nevertheless, a compromise was reached in 1289, the date of a new statute of *Quo Warranto*. In this year compromises it seems (as Mait-

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*est proculdubio carcerarius hic noster*. Whether our poor prisoner was actually imposed upon by some one in whose interest it was to spread the story of this conference or whether the author of the FLETA was himself one of those interested in spreading the story makes but little difference. The interesting point is that the story was being spread. In FLETA, Book III, Ch. 6, Sec. 3, we read: "The possessions of the Crown consisted of the ancient royal demesnes, homages, Christian liberties, and the like, and if these were alienated, the King, according to the profession made at Montpelier (*apud Montem Pessoloniam*) by all the Christian powers in the fourth year of the reign of King Edward, son of King Henry, would be obliged to revoke them." Cf. also Book I, Ch. 8, beginning: "Ancient manors or rights annexed to the Crown the King cannot alienate, but every king is in duty bound to revoke those things pertaining to his crown which have been alienated." *Ib.* Ch. 17, Sec. 17: "The magistrates swear [*inter alia*], that they will not assent to the alienation of those things which belong to the ancient demesne, to the Crown and the King."

<sup>14</sup> Perhaps we should not attribute any more importance to this "common form" than to the story of being in prison. Yet it must not be forgotten that the author agrees with Bratton in curtailing the King's power by omitting the last part of the quotation: "*Quod principi placuit legis habet vigorem cum lege regia quae de imperio ejus lata est (populus ei et in eum omne suum imperium et potestatem conferat)*." The passage is fully discussed in Selden's DISSERTATIO.

<sup>15</sup> "Shortly afterwards the King disturbed some of the nobles of the realm by wishing to know, through his justices on what warrant they held their lands; and if they had no good warrant to show, he immediately seized their estates. [This is not strictly true as *quo warranto* had to do with franchises. The first *quo warranto* for land, according to Lord Coke, 2 INST. 495, was brought in 31 E. I.] Among others the Earl Warenne was summoned before the king's justices and was asked by what warrant he held. He thereupon produced in court an ancient rusty sword and said: 'See, sirs, see, here is my warrant. For my ancestors came across with William the Norman and conquered their lands with the sword, and with the sword shall I defend them against whosoever wishes to take them from me. For the king did not win and subject the land by himself, but our ancestors took a share with him and helped!'"

land has deduced from a sudden break in the reasoning in the *Placita de Quo Warranto*) a prescription of one hundred years going back to the beginning of legal memory, was held sufficient to defeat the claim of the King.<sup>16</sup>

Perhaps we should not take the *Fleta* too seriously, or at least, too literally, in its comments on the matter of *Quo Warranto*. Without attempting to solve the mystery of the authorship of this book, an examination of its contents may throw some light on Edward's problems from the point of view of an administrative officer. True, Selden's conjecture is generally accepted that the author of the *Fleta* may have been one of the judges imprisoned by Edward on his return to England from Gascony in 1289. Does he not tell us that he was imprisoned in "the Fleet" at the time of writing the book? But aside from the fact that this detail of imprisonment looks suspiciously like a literary trick of the time—the author of *The Mirror* also prates of his imprisonment—internal evidence points to an author who was interested in the work of a steward or other high official in a manor, and particularly one in the service of the King. A great part of the second book, for example, is translated into Latin from the French of Walter of Henley and other authors of books on husbandry.<sup>17</sup> The rules that should govern the conduct of the various officials of a manor, rules of good husbandry as well as of law, are set down as duties. The quasi-feudal rights of the King, for example his right to royal minerals and royal fishes, and the Queen's right to the tails of all whales, are set out as complete headings.<sup>18</sup> The only cases of any interest added by the author of this abridgement of Bratton, for that is what the book amounts to, are incidents narrated that took place in the train of the King when he was travelling.<sup>19</sup> So we may assume that the author of the *Fleta* whoever he was, was prejudiced on the side of the King in the matter of *regalia* and the entire *Quo Warranto* controversy. Whether he would have been so prejudiced had he been one of the victims of the

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<sup>16</sup> 1 ST. REALM 107; 2 SELDEN SOCIETY PUB., lxxviii; 1 POL. & MAIT., \*147, \*559, citing ANN. DUNST., p. 360, and ANN. WAVERL. 395.

<sup>17</sup> In LAMOND AND CUNNINGHAM, WALTER OF HENLEY'S HUSBANDRY, LONDON, 1890, page xxxii, chapters 71-88 of Book 2 of the *Fleta* are shown to be derived from the SENECHAUCIE, WALTER OF HENLEY, and EXTENTA MANERII.

<sup>18</sup> Cf. pp. 61 ff. of the vulgate edition, DE STURGIONE, DE BALAENA.

<sup>19</sup> See, for example, the cases cited on pp. 67 of the printed editions.



King's zeal in establishing order among the King's servants, including the judges, is, to say the least, doubtful.

There are reasons in the economic history of England, quite apart from the king's attitude—or that of his advisers, whom Lord Coke prefers to blame—that explain the deep concern of the government administrators over the sources of royal income, and their jealousy of every royal privilege which to the detriment of the king's exchequer seemed to be usurped by a subject. Briefly the condition may be summarized as the failure of the feudal system as a revenue system. Taxation in any modern sense was still to be invented. And the introduction of a substitute system of revenue was delayed by the inability of the people of that day to realize the economic changes that had come about: the fall in the value of money since the ancient items, originally payable in kind, had been commuted to fixed sums; the rapid expansion of government functions and the attendant expense; the tremendous cost of the newer modes of warfare; and the devices that were being successfully resorted to to defeat the expectations of landlords and particularly the greatest landlord, the king.<sup>20</sup> Deficit financing forces the king to exploit all his rights to the very limit, and an all-around tightening up of administrative machinery is the result.

At first glance the great Statute of Westminster the First is essentially a provision for a more scrupulous administration of the king's business. It reads like a long circular letter to servants admonishing them to do their duties faithfully. But the scope and arrangement of this circular letter is more interesting than its particular provisions for here we see the hand of the codifier. There is not to be a tightening of the machinery here and there, but a *systematic* overhauling of the entire organization. In all of the longer statutes of King Edward, there is an attempt to survey the general state of the realm and to provide for the removal of all evils discerned and to fill all gaps. There is even some evidence of an attempt to review all important topics in a more or less systematic order. Thus in the Statute of Westminster the First we begin with the peace of the church and the realm. We are reminded of Ethelbert's dooms of nearly seven centuries earlier: "God's fee and the church's twelvefold." Of course, the writing was done by clerici, and it was natural to put the church first. So Edward's statute pro-

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<sup>20</sup> JENKS, EDWARD I, p. 324.

ceeds to the benefit of clergy, and disposing of the church's interest, it reaches the King's: escapes, wrecks. Then come public interests: elections, the conduct of courts and litigants, criminal matters. We now reach semi-private law, that is feudal law: lands in ward, wardship, distress; perhaps markets and fairs should be included here. Next we come to purely private matters, preeminently, to be sure, those touching the magnati, the great men of the realm, *Scandala magnati*, aids for knighthood, and the like. Finally, we reach a miscellaneous heading, the central theme of which is the purely private law involved in the writ of right. If too rigid an adherence to this system is not demanded, we shall find a general tendency in the other Edwardian statutes—which, after all, are nothing but the finally edited products of whole conferences of the embryonic parliament—to proceed from the higher interests of public law by gradations to such private law interests as come to the attention of the King. The statute of Gloucester already discussed descends from the all-important royal theme of *Quo Warranto* in the preamble (which may have been prefixed at a later date) to essoins and other details in real actions, touching on feudal and criminal law by the way. The Statute of Westminster the Second may seem an exception, but that is because the matters of highest import were in that year treated in separate statutes. Thus, the Statute of Winchester, with its archaic provision for hue and cry and the closing of city gates at sunset, deals with the peace of the realm; and the writ (or shall we call it a statute?) *Circumspecte Agatis*, deals with the troublesome questions of the church. Hence the residuary statute known as Westminster the Second is concerned chiefly with feudal and private matters. The first chapter is almost worthy of a place in constitutional law—*De Donis Conditionalibus*: it creates a new kind of estate. Its theme takes preference even over the jurisdiction of the King's court and certain minor church matters. There follows the usual series of feudal and procedural topics and then a most unusual amount of attention is devoted to private law. Chapter 24 includes the famous provision adding *brevia magistralia* to the *brevia formata, in consimilibus casibus*. The statute also goes into such matters as executor's liability (Chapters 19, 23), guardianship (Chapter 35), and the misuse of legal procedure (Chapters 36, 49), and particularly into what was becoming a source of irritation between the lord and man—the question of common-rights (Chapter 46). The other statute of major importance is sometimes called West-

minster the Third, but is better known from its opening words as *Quia Emptores*. This brief statute represents at once the climax of Edward's work as an organizer of the feudalism of his day and the beginning of the dissolution of that feudalism. The abolition of subinfeudation is calculated primarily to leave things as they are and to prevent constant readjustments of the feudal pyramid. It is entirely in accord with Edward's efforts in his extent of the manors and his *Quo Warranto* proceedings. But without subinfeudation, feudalism is bound to decay. Old manors may be destroyed by the loss of the necessary incidents to a manor's existence; new manors cannot be created under the terms of the statute of 1290.

Thus, whatever the result of Edward's earlier statutes may have been, his purpose was consistently to organize and define. The old order is theoretically sound, and the king's difficulties are to be ended by better management and the stopping of such leaks as those recited in the preamble to the statute *De Donis* (Westminster II.) or to *Quia Emptores* (Westminster III.). Mortmain and the various conflicts with Church jurisdiction in which the king is by no means uniformly successful have the same basis, for jurisdiction is from the point of view of feudal society as much a source of revenue as the ownership of land.<sup>21</sup>

Besides stopping the leaks, the king naturally seeks to expand the existing sources of income and to devise others. His treatment of the Jews and his dealings with foreign merchants are best explained in this connection. From the 17th of December in the fiftieth year of Henry III, we are told, until the Tuesday in Shrovetide the second year of Edward I, which was about seven years, the crown had four hundred and twenty thousand pounds, fifteen shillings and

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<sup>21</sup> The first statute of Mortmain is that of 1279, 7 Ed. I, STAT. 2. The statute *CIRCUMSPECTE AGATIS* of 1285 is really a writ issued by the King rather than an act of Parliament in which the King's courts are warned not to interfere with the jurisdiction of the Bishop of Norwich and his college. It suggests the existence of a dispute on such matters as defamation, compromise, or concession on the part of the King. At least the church jurisdiction is defined and such definition is in accordance with Edward's general policy to remove all doubts as to the outward limit of his rights. The economic contest with the church continues until the end of Edward's days. By the Bull *Clericis Laicos*, Pope Boniface in 1296 sought to put an end to the taxing of ecclesiastical persons. The STATUTE OF CARLISLE of 1307 retaliates by an attempt to stop the taxing of English religious orders by foreign bodies on the Continent.

four pence *de exitiis Judaismi*.<sup>22</sup> In 1287 he extorted from them twelve thousand pounds.<sup>23</sup> Three years later, in response to popular clamor, was passed his statute *De Judaismo* followed by his writ *De Judaeis Regni Angliae Exeuntibus*.<sup>24</sup> The king had squeezed this sponge dry, and partly beaten—though he capitalized even his beating by having a fifteenth granted to him by his parliament *pro expulsiōe Judaeorum*.<sup>25</sup>—he turned to Italian and Cahorsin bankers to mortgage forthcoming revenue to them. To fill the gaps in the feudal system in which the Jews had learned to fit themselves as traders, money lenders and petty artizans, Edward took under his protection foreign traders from the continent.<sup>26</sup>

That Edward's statutes did not always accomplish the purpose for which he had set out has already been illustrated in connection with the Statute of *Quia Emptores*. Perhaps another illustration is the famous clause with reference to the providing of writs in *consimilibus casibus*.<sup>27</sup> Blackstone (quoting Fairfax, a judge of the time of Edward III.) suggests that if this clause had been liberally used by the courts, the development of the Court of Chancery would have been unnecessary in England,<sup>28</sup> and in general, commentators on the passage have assumed that it was intended to serve as a general license for the making of new writs in particular cases. It is doubtful whether this was the purpose of the clause. The controversy had long been raging between those factions in England which were interested in the free multiplication of writs and those interested in curtailing the power of the King as represented by the Chancellor. In 1258, for example, the barons prescribed an oath

<sup>22</sup> 2 COKE INSTITUTES, 506 ff.

<sup>23</sup> JENKS, EDWARD I, 326.

<sup>24</sup> See 15 SELDEN SOCIETY PUB., p. xli.

<sup>25</sup> 2 COKE INSTITUTES, 507.

<sup>26</sup> In 1283 the STATUTE OF MERCHANTS, or of ACTON BURNEL, the King makes a great concession to merchants, extended by another statute two years later whereby they are able to collect their debts out of the land of their debtors. It must be remembered that the merchants were foreigners and could function in England only by virtue of the King's commission, for which they paid both directly and indirectly. It was, of course, easier to obtain a grant of customs to the King to be paid by the merchants than a tax which would fall directly and visibly on Englishmen. Cf, the Grant of Customs on Wool, Woolfells, and Leather, dated 1275, in STUBBS' S. C. 451.

<sup>27</sup> STAT. OF WESTMINSTER II, Ch. 24.

<sup>28</sup> 3 BL. COM. 51.

for the Chancellor that he would not seal any writ other than a writ of course, without the commandment of the King and of his council assembled.<sup>29</sup> That this oath was either not taken or not lived up to is abundantly evident from the continuation of the process of making new writs, or rather making old ones writs of course, down to Edward's day. The writ of trespass had but recently become a writ of course,<sup>30</sup> and a career of almost unlimited usefulness was before it. Something seems to have happened about 1270 to make the writ of debt quite common.<sup>31</sup> By 1272, however, the list of writs is practically closed.

The King would no doubt like to open it. The barons, however, are cautious. They will not admit the right to make new writs freely; all that they will yield is a compromise that the Chancellor may proceed in *very similar* cases to those provided for in the established list of writs. The clause should, thus, be read in a restrictive sense as well as in a permissive sense. It is, therefore, quite as easy to see a misapplication of it in the history of *assumpsit* as it is to see a neglect of it in the field that soon came to be occupied by equity.

Who wrote these statutes for Edward? Chief Justice Hengham in a fit of anger once gave part of the secret away. In a Year Book case<sup>32</sup> he once said: "Do not gloss the statute; we understand it better than you do, for we made it." This was said of the Statute of Westminster I, which had been on the books for twenty-two years. Perhaps Hengham simply meant that the judges had had a hand in the framing of the act. Hengham was a judge in 1285 and probably earned part of his annual fee—which was 30 marks in that year<sup>33</sup>—by helping in the drafting of the statute. At any rate, Hengham, though among the judges accused of corruption in the year 1289 when the king returned from Gascony, seems to have fared better than his colleagues. The old doggerel<sup>34</sup> that tells of their fate presents him as violently disputing, but whether it was his disputation or the fact that the king entertained a high opinion of his usefulness

<sup>29</sup> Provisions of Oxford, 1258, STUBBS' S. C. 387.

<sup>30</sup> Perhaps in 1252. Cf. AMES' LECTURES ON LEGAL HISTORY, 170, n. 3. 2 ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 582; 3 *ib.* 423.

<sup>31</sup> There are fifty-three dated entries on Curia Regis for Pasch. 55 Henry III; 2 POL. & MAIT. \*202.

<sup>32</sup> 33-35 Y. B. Ed. I, Roll Series, p. 82.

<sup>33</sup> See Horwood's Preface to Y. B. 20 and 21, Ed. I, p. 10, n. 1.

<sup>34</sup> Quoted in SELDEN'S DISSERTATIO, p. 548.

as a legislative draftsman or legal author, he seems to have remained in favor until a ripe old age. Internal evidence suggests several interesting points about the authorship of these acts. In the first place, *clerici* clearly had a hand in them. This is evidenced not only by the arrangement of the subject matter which places the interests of the church first, but also by the use of the Latin language in all of those passages in which the church is at all interested, even where they occur in the middle of a French version of a statute. The statutes of this period, it must be remembered, are written almost indiscriminately in Latin and French. On the other hand, in the Latin texts of the statute of Westminster II, a passage in which the church has no interest, but one in which the rising profesison of the law is more deeply concerned, Chapter 49, on Champerty by Justices, is in French. We have reached a period of English law when its custody is passing from the hands of the men who are primarily church men to that of men who may be incidentally churchmen, but who are primarily lawyers.<sup>35</sup>

If, now, we turn to the most detailed and carefully drawn sections of the law, we cannot escape the conviction that they have been drawn by men thoroughly conversant with some particular part of the administration of government. Contrast, for example, the mischiefs which they undertake to remedy with the abuses so volubly uttered by the contemporary author of *The Mirror*. In the statutes we find no abstractions, nothing Utopian. On the contrary, Westminster I begins with the assumption that the law is good enough in most particulars if it is only observed. Administrative officers are cautioned to see that it is observed hereafter, and details that had formerly been left to their discretion are now put down in such a way as to limit their discretion for the future. In fact, it is almost impossible to distinguish between some of the so-called statutes and mere administrative orders. The *extenta mannerii*<sup>36</sup> are clearly directions to public officials. Is Westminster I less so? The so-called *statuta de officio coronatoris* given in the Books as the second statute of the fourth year of Edward I is nothing but a translation from Bratton.<sup>37</sup> The year 1293 gives us what purports to be the custom of Kent as ascertained by an eyre—this, too, has some-

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<sup>35</sup> 1 POL. & MAIT. \*190, \*195.

<sup>36</sup> Sometimes referred to as 4 ED. I, STAT. I.

<sup>37</sup> Book 3, Chap. 5. Cf. 2 POL. & MAIT. \*641.

times been called a statute.<sup>38</sup> In other words, what we have is rather a series of regulations requested by judges, administrative officers, and other interested parties, and issued much after the fashion of a Court's instructions to a jury, made into a unit as the statute of a particular year. Gaps are, of course, filled in by the draftsman, but the difference between these stop-gaps and the long sections of administrative details suggests such a composition as would result if the administrative orders of several departments of the United States Government were strung together loosely so as to constitute a code of American Federal Law. There we would find, along with the minutest details authorizing officials to deal with immigrants a few sweeping clauses to the general effect that courts should do justice by enforcing the laws and by extending existing remedies to cases very similar in principle to the old ones, but not to new types of cases. A further resemblance to administrative orders is suggested when we ask to whom are these statutes addressed? Clearly not to the people in general, but by the king to his officials. This is but natural if we remember that printing had not yet been invented, and that even if the number of copies of the statutes had been multiplied indefinitely, the people of England would have been unable to read them. The early statutes were not even made by the people's representatives in any true sense of the term. Hence the scattering of "parliament" at the close of a session could not be expected to serve as a means of communicating to the people the additions to their law.

The later statutes of Edward—shall we call them the Novels of the English Justinian?—are quite different in respect to authorship, style, persons addressed, and general purport. After 1292, the turning point in Edward's career and probably in the history of English law, the statutes are scattering, brief, and unimportant. The *Confirmatio Cartorum* of 1297 stands out—it is rather the embodiment of the defeat of Edward than of any accomplishment of his. To the limits that Magna Carta had imposed in the past on English monarchs, the version of this year, the first French edition, adds the exclusiveness of Parliament's right to tax. The so-called Statute *De Tallagio non Concedendo* is but an appendix to Magna Carta in which the king gives up all claim to tallage, aid and reliefs—which are only disguised taxes. The statutes, in a word, are no longer Edward's. His attempt to get the Pope's help to release him from

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<sup>38</sup> 2 POL. & MAIT. \*270.

his oath is fruitless. His humble appeal to the people represented in the new Parliament accomplishes the immediate end of serving the King's financial needs, but at the same time it marks the end of royal legislation and the beginning of parliamentary statutes.

The king does not realize what has happened, perhaps no one at this age does. The feudal revenues have failed—and taxation is born, and with it its twin sister, parliamentary power. In course of time feudalism fades away and an economic organization of society related to the parliamentary system and to taxation takes its place. We may call it capitalism or by any other name which will indicate the fact that the power of making laws is connected with the power to grant or withhold money. This system is not exactly the same as that which gives a power of control to majorities independently of who pays the taxes. In fact, it was a long time before the new parliament of Edward's day realized that it was a law-making power as well as a check upon the sovereign. Perhaps it is fair to say that in Edward's day the royal prerogative of legislation has been taken away, and that nothing has been put in its place—and this summary may explain why it is that for centuries to come nothing in England equals the legislative activity of the last years of royal law-making, the first half of Edward's reign. The paralysis of the royal hand, rather than the excellence of the work that it has done, accomplishes the crystallization, the quasi-codification of English law at the beginning of the period of the Year Books.

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